

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES I. WELLS)	
Claimant)	
)	
VS.)	
)	
ENVISION, INC.)	
Respondent)	Docket No. 1,063,287
)	
AND)	
)	
ACCIDENT FUND NATIONAL INS.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the July 24, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark. R. Todd King, of Wichita, Kansas, appeared for claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the preliminary hearing transcript, with exhibits, dated March 28, 2013, and all pleadings contained in the administrative file.

The ALJ Order states in part:

A preliminary hearing was held on March 28, 2013. Dr. Pedro Murati and Dr. Benjamin Norman reports gave conflicting opinions on "prevailing factor."

The parties on February 26, 2013, agreed to have Dr. Paul Stein examine the Claimant for his causation opinion.

After the March 28, 2013, hearing, Dr. Stein submitted reports dated April 23, 2013, and June 6, 2013. He states:

"2. It is difficult to make a definitive statement regarding the prevailing or primary factor in the current symptomatology. It is a combination of aging and the repetitive work activity. In this particular case, I cannot tell which factor was more important. 3.

Given that the work activity likely accelerated the development of degenerative disease, over time, it would be productive of a structural change in the lower back." [italics in original]

The key words are "structural change in the lower back."

The Court finds that the prevailing factor for the Claimant's present problems is the repetitive nature of his work.

ISSUES

Respondent seeks reversal of the preliminary hearing Order and raises issues of whether "claimant's repetitive work activity [was] the primary factor, in relation to any other factor, that caused the claimant's injury" and whether "claimant's injury by repetitive trauma [arose] out of his employment."¹

Claimant argues the ALJ's Order should be affirmed.

The sole issue raised on review is: Did claimant sustain personal injury by repetitive trauma arising out of and in the course of his employment with respondent, including whether the repetitive trauma was the prevailing factor causing the injury?

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Neither claimant nor any other witness testified. The exhibits offered by the parties at the preliminary hearing revealed claimant was employed by respondent as a machine operator for approximately five and one-half years. In addition to operating machinery, claimant's job duties included lifting cases of commercial trash bags onto pallets, a task that required repetitive bending, twisting and climbing.

Claimant, now age 59, alleged a series of repetitive trauma with a date of injury of October 17, 2012.²

Claimant told Dr. Murati of experiencing back pain in August 2012, although the medical exhibits establish claimant began consulting his personal physician, Dr. Travis

¹ Application for Review at 1.

² P.H. Trans. at 4.

Hubin,³ for back pain on May 8, 2012. Lumbar x-rays conducted on May 8, 2012 revealed mild L3-4 and L4-5 disk space narrowing and grade 1 L3-4 spondylolisthesis. Dr. Hubin provided conservative treatment through October 19, 2012.

On October 23, 2012, claimant was sent by respondent to Dr. Benjamin Norman at Via Christi Occupational Medicine. Claimant was seen by Dr. Norman on only one occasion. Dr. Norman diagnosed degenerative joint disease of the lower back and recommended a lumbar MRI scan. That test was not authorized. Dr. Norman opined:

I explained to Mr. Wells that at this point with no trauma or specific incident for circumstances precipitating his injury that this would be considered to be degenerative and not [a] work-related issue.⁴

At the request of claimant's counsel, Dr. Pedro Murati, board certified in physical medicine and rehabilitation, evaluated claimant on January 18, 2013. Dr. Murati diagnosed right SI joint dysfunction and low back pain with signs of radiculopathy. Dr. Murati opined:

The claimant sustained multiple repetitive traumas at work which resulted in low back pain. . . . He has no significant pre-existing injuries that would be related to his current diagnoses. He has significant clinical findings that have given him diagnoses consistent with his described multiple repetitive traumas at work. Therefore, it is under all reasonable medical certainty and probability, the prevailing factor in the development of his conditions is the multiple repetitive traumas at work.⁵

By Order dated March 28, 2013, the ALJ appointed Dr. Paul Stein to address whether "[c]laimant's employment is the prevailing factor for his present problem." Dr. Stein examined claimant on April 23, 2013, and provided two reports to the ALJ, the first dated April 23, 2013, and the second dated June 6, 2013.

In Dr. Stein's first report, he expressed a desire to review information concerning claimant's job description, including the physical requirements associated with the job. Information concerning claimant's job was provided to Dr. Stein by both counsel, following which Dr. Stein authored his second report. In that report, Dr. Stein opined:

Assuming the accuracy of the description by Mr. Wells the following are my opinions regarding causation; 1. As noted in my previous report, the primary problem here is degenerative disk disease. It is unlikely that the disk degeneration was caused specifically by the work activity. However, it is more likely than not that the work

³ Dr. Hubin's treatment records are not in evidence.

⁴ P.H. Trans., Resp. Ex. 2 at 1.

⁵ *Id.*, Cl. Ex. 1 at 3-4.

activity over time was a factor contributing to the current symptomatology, aggravating and accelerating degenerative disease. 2. It is difficult to make a definitive statement regarding the prevailing or primary factor in the current symptomatology. It is a combination of aging and the repetitive work activity. In this particular case, I cannot tell which factor was more important. 3. Given that the work activity likely accelerated the development of degenerative disease, over time, it would be productive of a structural change in the lower back.⁶

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-508 provides in part:

(e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

(f) (1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injuries may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(I) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

(g) Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

⁶ Dr. Stein's June 6, 2013 report at 1.

ANALYSIS

The undersigned Board Member finds claimant did not sustain his burden to prove personal injury by repetitive trauma arising out of and in the course of his employment. The ALJ's preliminary hearing Order is accordingly reversed.

Claimant had no injuries or other issues with his low back before he commenced employment for respondent, although he did have asymptomatic lumbar degenerative disease. The degenerative disease evident by x-rays was not caused by claimant's work activities. There was evidence that claimant's work triggered, precipitated, aggravated, accelerated or made symptomatic the preexisting degeneration in claimant's low back. Under the Old Act claimant's alleged series of repetitive trauma might have been compensable. However, the 2011 amendments to the Act altered the requirements necessary to prove a compensable claim.

The causation opinions of Drs. Norman and Murati provide little assistance in resolving the issue of causation. Dr. Norman opined claimant's condition was degenerative in nature and not work-related. However, Dr. Norman seemed to base his opinion, at least in part, on the lack of a specific trauma or work-related event. Of course, a compensable claim may result from personal injury by repetitive trauma and occupational disease, without a specific traumatic event or work-related incident. Dr. Murati concluded claimant sustained personal injury by a series of repetitive trauma and that claimant's work activity was the prevailing factor in causing claimant's injury. But, in expressing his causation opinion, Dr. Murati mentioned nothing about claimant's preexisting degenerative disease and what role it played in causing claimant's low back symptoms.

The court-ordered physician, Dr. Stein, who was selected to perform the neutral examination by agreement of the parties,⁷ did not state claimant's work activities were the prevailing factor in causing claimant's injury. He said it was difficult for him to make a definitive statement regarding the prevailing or primary factor in claimant's current symptoms and that both age and repetitive work activity were factors. However, he could not tell which factor was more important. In the opinion of this Board Member, the preponderance of the credible evidence is insufficient to support the conclusion that the prevailing factor in causing claimant's injury was the repetitive activities required by his work.

The ALJ emphasized Dr. Stein's phrase "structural change in the lower back."⁸ However, when read in context, it is clear the doctor was referring to the acceleration of

⁷ P.H. Trans. at 8.

⁸ The phrase "lesion or change in the physical structure of the body" is used in the definitions of "personal injury" and "injury" in K.S.A. 2012 Supp. 44-508(f)(1).

claimant's degenerative disease. Under the New Act, the acceleration of a preexisting condition, in and of itself, does not result in a compensable claim.

CONCLUSION

This Board Member finds claimant did not sustain his burden to prove personal injury by repetitive trauma arising out of and in the course of his employment with respondent and claimant did not prove his repetitive work was the prevailing factor in causing his injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹⁰

WHEREFORE, the undersigned Board Member finds that the July 24, 2013, preliminary hearing Order entered by ALJ John D. Clark is reversed.

IT IS SO ORDERED.

Dated this 7th day of October, 2013.

HONORABLE GARY R. TERRILL
BOARD MEMBER

c: R. Todd King, Attorney for Claimant
trod@kbafirm.com; tking@kbafirm.com

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
kdonley@McDonaldTinker.com; pschweninger@mcdonaldtinker.com

Honorable John D. Clark, ALJ

⁹ K.S.A. 2012 Supp. 44-534a.

¹⁰ K.S.A. 2012 Supp. 44-555c(k).